

SEP 11 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

**In the Matter of
Amendment of Parts 20 and 24 of the
Commission's Rules -- Broadband PCS
Competitive Bidding and the Commercial
Mobile Radio Service Spectrum Cap**

**Amendment of the Commission's Cellular/PCS
Cross-Ownership Rule**

DOCKET FILE COPY ORIGINAL

GN Docket No. 90-314

Pacific's Opposition shows that Pacific apparently regrets its decision to divest its cellular interests, and that, now that it has only wireline local exchange and PCS interests, it wants to limit competition from cellular carriers. Pacific also disingenuously asserts that 20 MHz of PCS spectrum is sufficient, while Pacific has obtained 30 MHz of PCS spectrum. Pacific compounds its errors with a flawed competitive argument that does nothing to rebut the competitive analysis provided by Radiofone. For these reasons, the Commission should dismiss Pacific's Opposition as mere opportunism.

No. of Copies rec'd _____
List ABCDE

I. Pacific Made a Business Decision to Divest Its Cellular Interests

Pacific asserts that it somehow is at a disadvantage because it cannot obtain a cellular license in areas where it has up to 40 MHz of PCS spectrum. Pacific Opp'n at 3-4. But Pacific is affiliated with a wireline local exchange carrier (LEC) that provides telephone service in its PCS service area. On the other hand, Radiofone is not affiliated with any LECs, and Radiofone merely seeks the opportunity to provide cellular services and 30 MHz PCS service in the same area. Thus, Pacific apparently would like to provide three services in one area -- local exchange service, PCS and cellular. Radiofone only asks for the opportunity to provide only two of those services -- 30 MHz PCS and cellular.

Pacific facetiously suggests that Radiofone should enter the wireline local exchange business. But, it is not Pacific's place to determine what business opportunities Radiofone should seek. As shown in Attachment A, Radiofone has decades of experience providing wireless services, and seeks to use its expertise in wireless services to provide PCS by obtaining 30 MHz of PCS spectrum. Moreover, unlike Pacific which has a wireline monopoly with revenues protected by regulation, Radiofone would have to provide wireless local loop in order to make an impact in the marketplace.

In any event, Pacific's complaint that it cannot have cellular interests is ludicrous. Pacific was a participant in Docket No. 90-314 since the time when the PCS/cellular cross-ownership rule was under reconsideration. And it was an intervenor in Radiofone's case that was consolidated in Cincinnati Bell I. Thus, Pacific knew that the PCS/cellular cross-ownership rule, which was challenged by Radiofone, might be eliminated either on reconsideration at the FCC and on review in court. However, while the PCS/cellular cross-ownership rule was being reconsidered, Pacific divested its cellular interests (presumably so it could qualify as a PCS applicant). Before it did so, Pacific argued vociferously against the PCS/cellular cross-ownership rule. E.g., Reply Comments of Pacific Telesis Group, GEN Docket No. 90-314, at 10, filed Jan. 8, 1993 (ownership of PCS licenses in an affiliate's cellular service area will not inhibit competition); see also id. at 10-11 (noting that the market

will include not only two cellular providers and three PCS providers, but also SMR). Now, Pacific has done a self-serving about-face, and wants to restrict the ability of cellular carriers to obtain PCS licenses.

If Pacific had not divested its cellular interests, Pacific and its affiliates could provide local exchange service and hold 20 MHz of PCS spectrum and 25 MHz of cellular spectrum in the same area. However, since the spinoff of its cellular interests, Pacific won 30 MHz PCS licenses. Pacific cannot now obtain cellular licenses in its PCS service areas without disaggregating part of its PCS spectrum (assuming the Commission would allow it to do so). Pacific apparently regrets its decision to divest its cellular interests. With PCS licenses in hand and no cellular licenses, Pacific understandably now wants to limit competition, and in particular, limit the ability of cellular licensees to obtain PCS spectrum. The Commission's decision on Radiofone's Petition should not be affected by the fact that Pacific's parent made the precipitous business decision to divest its cellular interests years before the Commission issued its decision on remand from Cincinnati Bell I.

II. Pacific Does Not Provide Support for Its Assertion that 20 MHz Is Sufficient

Pacific asserts that 20 MHz of PCS spectrum is sufficient, and that cellular telephone companies with 20 MHz of PCS spectrum will be able to offer the same scope of services as offered by 30 MHz PCS licensees. Pacific Opp'n at 3-4. Pacific claims that the record supports its assumption. Id. at 3. However, the only "record support" that Pacific provides is a Commission statement that 20 MHz of spectrum "'will be sufficient to develop and provide new digital services.'" Id. That statement falls far short of stating that 20 MHz of spectrum will support the same digital services as 30 MHz of spectrum. Neither the Commission nor Pacific provides any documentary support for Pacific's assertion that 20 MHz will support the same services as 30 MHz. Moreover, Pacific's statement that 20 MHz of PCS spectrum is sufficient is belied by the fact that it obtained 30 MHz PCS licenses in the A and B Block auction. If 20 MHz were sufficient, Pacific could have obtained two 10 MHz licenses in the

D/E/F Block auction. The Commission therefore should reject Pacific's assertions about the sufficiency of 20 MHz of PCS spectrum.

III. Pacific's Competitive Analysis Is Flawed

Pacific disagrees with Radiofone's objection to the product market definition. Pacific Opp'n at 2. The only reason Pacific gives is that Congress has instructed the Commission to avoid an excessive concentration of licenses. However, the Sixth Circuit, in Cincinnati Bell I, 69 F.3d at 764, stated that the Commission cannot arbitrarily adopt rules simply to avoid excessive concentration of licenses. It must provide a reasoned basis for its rules. But the Commission has not provided a reasoned basis for its product market.

In any event, attempting to avoid excessive concentration of licenses begs the question: How much concentration is "excessive"? That question cannot be answered until there is an answer to the more fundamental question: In what market is concentration to be measured? That question requires an analysis of the degree of competition among the various alternatives. Pacific's argument is completely lacking in any such analysis.

Pacific does not disagree with Radiofone's argument that spectrum allocation is an improper measure of capacity. Rather, it moves directly to the question of competitive effects from the asserted high concentration. But if the concentration is improperly measured, as Radiofone asserts and Pacific does not dispute, then there is no basis to argue that concentration is unduly high. Pacific's argument thus rests on an illusory foundation.

Moreover, the factors Pacific asserts will injure competition are insubstantial. There are barriers to entry, as Pacific asserts, Pacific Opp'n at 2-3, but they are counterbalanced by the extensive regulatory control which helps assure competitive functioning. See generally Cincinnati Bell I, 69 F.2d at 763 (discussing build-out requirements as a less restrictive alternative to restrictions on cellular eligibility to obtain PCS licenses).

The other factor Pacific asserts will injure competition is that cellular providers will outbid new entrants in order to forestall competition. Pacific Opp'n at 3. But this makes no

sense for a number of reasons. First, PCS licenses are extremely expensive. It would be irrational to buy an expensive license merely to enhance the profitability of another license. Second, the winners of the PCS licenses have construction and operational obligations which impose huge financial burdens. It makes no sense to incur such a disproportionate expense merely to enhance an existing facility. Third, the argument presupposes that a combined cellular/PCS licensee will have power to forestall competition. As Radiofone demonstrated in its Petition, such power would be defeated by competitive forces which the Commission has ignored, such as other mobile communications services. In short, it would be economically irrational for a cellular carrier to buy a PCS license merely to restrain competition. The more rational action would be to buy a PCS license in order to compete, just as any other prospective bidder would. Moreover, Pacific's assertion that cellular carriers would outbid others in order to forestall competition was considered and rejected by Cincinnati Bell I. There, the court held that the FCC had not provided any recorded evidence to support its fears of such behavior. 69 F.3d at 962-63. Pacific has not presented any record evidence here.

In sum, Pacific's arguments were considered and rejected in Cincinnati Bell I. The Commission should similarly reject them here.

CONCLUSION

Pacific's opportunistic request to limit the ability of non-wireline cellular carriers to compete in PCS should be dismissed. And neither its disingenuous assertion that 20 MHz of PCS spectrum is sufficient, nor its flawed competitive analysis have merit.

For the foregoing reasons, Radiofone respectfully reiterates its request that the Commission: (a) modify the 45 MHz spectrum cap so that cellular carriers, who do not provide wireline service in their cellular service areas, may obtain, or otherwise have an attributable interest in, 30 MHz of PCS spectrum; (b) eliminate the 49% equity exception for the F Block; (c) adopt the C Block affiliation exclusion for the F Block; and (d) count C Block licenses as assets for F Block eligibility purposes.

Respectfully submitted,
RADIOFONE, INC.

By:



Ashton R. Hardy

Michael Lamers

Hardy and Carey, L.L.P.

111 Veterans Boulevard - Suite 255

Metairie, LA 70005

(504) 830-4646

Its Attorneys

**RADIOFONE
DECADES OF GROWTH, INNOVATION AND PROGRESS IN LOUISIANA**

- | | |
|------|---|
| 1958 | Larry and Don Garvey start the first beep paging service in New Orleans and only the second in the country. |
| 1959 | Garvey's pioneer the second selective signaling system in the country which allows individual paging receivers to receive a unique beep. |
| 1960 | Mobile telephone service is added to paging service and the name Radiofone is born. |
| 1968 | Radiofone is first RCC in country to initiate direct dial paging which allows beepers to be dialed from the telephone network. |
| 1970 | Radiofone installs one of the earliest direct dial tone and voice systems in the country. |
| 1972 | Radiofone establishes the first IMTS direct dial mobile telephone system in the Southeast. |
| 1976 | Radiofone installs the first fully automatic trunked portable telephone system in the United States with number identification and call billing. |
| 1978 | Radiofone installs second wide area system in the United States allowing customers to have local numbers in various cities without the expense of long distance charges. |
| 1981 | Radiofone forms a manufacturing subsidiary to manufacture fully automatic mobile telephone switching equipment. |
| 1984 | Radiofone installs the first nonwireline cellular telephone system in the Southeastern United States. Radiofone is the only cellular system in the U.S. to be built as originally engineered. |
| 1986 | The Small Business Administration of New Orleans selects Radiofone to receive "The Most Innovative Company in the State of Louisiana" Award for 1985. |

CERTIFICATE OF SERVICE

I, Ashton R. Hardy, a member of the firm of Hardy and Carey, L.L.P., certify that on this 11th day of September, 1996, I have caused one copy of the foregoing to be sent via first class U.S. Mail, postage prepaid the following:

James Tuthill
Betsy Stover Granger
Pacific Bell Mobile Services
4420 Rosewood Drive
4th Floor, Building 2
Pleasanton, CA 94588

Margaret E. Garber
Pacific Bell Mobile Services
1275 Pennsylvania Avenue, NW
Washington, DC 20004


Ashton R. Hardy